No. 05-705

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Certiorari Granted February 21, 2006

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RELEVANT DOCKET ENTRIES

U.S. District Court
WESTERN DISTRICT OF WASHINGTON (Seattle)
CIVIL DOCKET FOR CASE #: 2:03-cv-00694-RSM

Date Filed	#	Docket Text
03/19/2003	1	COMPLAINT and JURY DEMAND (Summons(es) issued) Receipt # 850415 (PM) (Entered: 03/24/2003)

* * *

10/20/2003	11	RESPONSE to 9 Dft's MOTION for Judgment on the Pleadings, and MOTION for Leave to Amend 1 Complaint by Plaintiff Metrophones Telecommunications Inc. Noting Date 10/29/2003. (Attachments: # 1 Exhibit A-C# 2 Text of Proposed Order) (AF,) (Entered: 10/24/2003)

* * *

12/16/2003	20	ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO AMEND; re: 9 MOTION for Judgment on the Pleadings, and 11 MOTION to Amend; by Judge Marsha J. Pechman. (AF,) (Entered: 12/16/2003)

* * *

01/12/2004	29	ORDER granting 22 Motion for Interlocutory Appeal/Certificate of Appealability, by Judge Marsha J. Pechman. (AF,) (Entered: 01/12/2004)

03/26/2004	30	ORDER of USCA (04-80015) as to 22 MOTION for Certificate of Appealability filed by Global Crossing Telecommunications Inc. The petition for permission to appeal is GRANTED. Within 10 days of this order, petitioner shall perfect the appeal. (SA) Modified on 4/1/2004 (SA). (Entered: 04/01/2004)

* * *

US Court of Appeals for the Ninth Circuit

1/12/05	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Alfred T. GOODWIN, Susan P. GRABER [04-35287] (kym) [04-35287]
	* * *
6/30/05	Filed order (Mary M. SCHROEDER, Alfred T. GOODWIN, Susan P. GRABER,): The parties, including amicus, are to file supply briefs addressing the following question: How does National Cable & Telecommunications Ass'n v. Brand X Internet Servs. No. 04-277, 2005 WL (U.S. 6/27/05) affect the analysis of the issues before the court in the present case? The briefs are not to exceed 20 pages and are to be filed simultaneously within 21 days of the filed date of this order. [04-35287] (kkw) [04-35287]
	* * *
9/8/05	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear its own costs on appeal. Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Mary M. SCHROEDER; Alfred T. GOODWIN; Susan P. GRABER, author.) FILED AND ENTERED JUDGMENT. [04-35287] (kkw) [04-35287]
	* * *

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation, Plaintiff, v GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation and UNIDENTIFIED COMPANIES I THROUGH X, Defendants.	No. C03-0694P COMPLAINT JURY TRIAL DEMANDED (Filed Mar. 19, 2003)

The Plaintiff above named complains of Defendants as follows:

I. INTRODUCTION AND SUMMARY OF COMPLAINT

1. Under 47 U.S.C. § 276(b)(1)(A), 47 C.F.R. §§ 64 1300 et seq., and various orders of the Federal Communications Commission ("FCC") in Common Carrier Docket No. 96-128, Defendant Global Crossing Telecommunications, Inc. ("Global Crossing"), as an interexchange carrier of various types of long distance communications, is required to compensate Plaintiff, as a payphone service provider ("PSP"), at the rate prescribed by the FCC, for each and every compensable call including, but not limited to, completed access code calls and toll free calls, that has been made at any time since January 29, 2002 from a payphone owned by Plaintiff and carried over Global Crossing's telephone network facilities. Such compensation is referred to herein as "payphone compensation."

2. Many compensable calls placed from payphones owned by Plaintiff have been carried over Global Crossing's telephone network, but Global Crossing has failed and refused to provide Plaintiff a full accounting of such calls, and has failed and refused to pay Plaintiff the full amounts of payphone compensation required to be paid under federal law, despite Plaintiff's demands. Plaintiff seeks an accounting of the amounts of payphone compensation owed by Global Crossing for all compensable calls, and judgment for such amounts, plus interest, costs, and attorneys' fees as provided by law.

II. PARTIES

3. Plaintiff Metrophones Telecommunications, Inc. ("Metrophones") is a payphone service provider with its headquarters and principal place of business located in Bellevue, Washington.

4. Plaintiff owns and operates one or more coin-operated and/or coinless payphones for use by the public. As defined by the FCC, Plaintiff is an independent PSP.

5. On information and belief, Defendant Global Crossing is a Michigan corporation with its principal place of business in New York. Unidentified Companies I through X are other subsidiaries and/or affiliates of Global Crossing. Inasmuch as the vast and complex structure of the Global Crossing family of companies makes it difficult to ascertain which particular affiliates are responsible to pay payphone compensation to Plaintiff, as alleged herein, Plaintiff reserves the right to amend its complaint to specifically name such responsible parties, upon ascertainment of the identity thereof. Upon information and belief, all Defendants have acted in concert with respect to

the matters alleged herein. As used hereinafter, the term "Global Crossing" refers to the affiliate or affiliates that are responsible for the payment of payphone compensation to Plaintiff, as alleged herein. Global Crossing regularly conducts business in the state of Washington.

6. Global Crossing is a common carrier as defined in 47 U.S.C. § 153(10). As such, Global Crossing is subject to regulation by the FCC under Title 47 of the United States Code.

7. Global Crossing provides various telecommunications services to the public through its telecommunications network that is accessible from Bellevue, Washington and elsewhere in Washington and the United States. Such services include the carriage over Global Crossing's telecommunications network of various types of calls placed from payphones, such as access code calls (calls made by first accessing Global Crossing's network through dialing a code number) and toll-free calls (calls for which the recipient has previously agreed to pay the toll charges).

III. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. Further, 47 U.S.C. § 207 grants subject matter jurisdiction over this action to this Court.

9. Venue is proper in the United States District Court for the Western District of Washington, under 28 U.S.C. §§ 1391(b) and 1391(c), because Defendant Global Crossing is subject to personal jurisdiction in this district and hence, is deemed to reside in this district.

IV. PAYPHONE COMPENSATION UNDER FEDERAL LAW

10. As a PSP, Plaintiff makes its payphones available to the public to enable persons to make telephone calls. Plaintiff receives compensation for some types of payphone calls through direct payment by the caller (e.g. through the deposit of coins into the payphone) or through commission payments from Plaintiffs presubscribed carrier (the carrier to which operator-assisted calls are automatically routed by agreement between Plaintiff and such carrier). However, a substantial portion of calls placed from Plaintiff's payphones can be and are made without any compensation to Plaintiff from the caller or from Plaintiff's presubscribed carrier. Such calls include access code calls and toll-free calls (all of which shall be referred to hereinafter as "coinless" calls) that are initiated from Plaintiff's payphones and are routed over various carriers' telecommunications networks and facilities, including those of Global Crossing. For coinless calls, the interexchange carrier receives payment through various means, including the use of calling cards, credit cards, debit cards, prepaid cards, and calls billed to another party (e.g., collect, third-party, and toll-free calls).

11. In February, 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). In relevant part, the Act directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all independent payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. § 276(b)(1)(A).

12. Pursuant to the Act, the FCC has promulgated regulations and has issued orders that require carriers, including Global Crossing, to pay payphone compensation to PSPs, such as Plaintiff, for all completed coinless calls made from a payphone where the caller utilizes a carrier other than the payphone's presubscribed carrier. Such coinless calls include, without limitation, (1) calls that are terminated on Global Crossing's own network, (2) calls that are initially routed by the local exchange carrier to Global Crossing's network, and (3) calls from Global Crossing's network that are routed to other carriers and/or resellers for completion. In particular, the FCC has promulgated the following regulation

> (a) Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code *or* subscriber toll-free payphone can is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract

47 CFR § 64.1300(a).

13. Pursuant to the Act, the FCC has issued orders establishing the default per call compensation rate (i.e. the rate that applies in the absence of a contract between the PSP and the carrier) at $.24 per call for all compensable calls made from and after April 21, 1999 rate aff'd sub Nom *American Pub Communications Counsel v FCC*, 215 F.3d 51 (D.C. Cir. 2000).

14. Pursuant to the Act, the FCC has promulgated regulations and has issued orders requiring each carrier, including Global Crossing, to track or arrange for the tracking of each compensable coinless call carried over its

network including, but not limited to, coinless calls completed by Global Crossing and coinless calls routed to Global Crossing's resellers and other interexchange carriers. In particular, the FCC has promulgated the following regulation

> (a) It is the responsibility of the first facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by § 64.1300(a). The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier must also send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

47 C.F.R. § 1310(a).

15. Under FCC-approved procedures adopted by the telecommunications industry, PSPs, such as Plaintiff, provide to carriers, such as Global Crossing, or to their designated agent(s), on a calendar quarter basis, a list of the telephone numbers of the payphones owned and operated by the PSP as of the end of the applicable calendar quarter. Each such unique telephone number is referred to as an "ANI," which is the acronym for "Automatic

Number Identification." The ANI, which may also include payphone specific coding digits identifying as a payphone the telephone from which a call is made, is transmitted with each call made from a payphone, and is recorded and stored by the carrier to whose network the call is routed. The carrier can determine which calls carried over its network were made from which payphones by comparing the ANI lists submitted by a PSP to the carrier's call detail records or other records maintained by the carrier identifying the ANI for each recorded call. By such means, the carrier can also determine to whom payment of payphone compensation should be made, and the amount of such payment.

16. Plaintiff is able to determine, with a high degree of accuracy, the number of compensable coinless calls made from each of its payphones and routed to Global Crossing as the first facilities-based interexchange carrier. Such data are collected by a third party, Bulletins, to whose services Plaintiff subscribes.

17. Pursuant to FCC regulations, carriers are required to remit payment of payphone compensation to PSPs on a quarterly basis.

18. From January 29, 2002 to the date of this Complaint, many compensable coinless calls have been made from the payphones of Plaintiff, which have been routed by the applicable local exchange carrier to Global Crossing as the first facilities-based interexchange carrier.

19. Plaintiff has submitted its ANI lists to Global Crossing or its designated agent for the periods of the first quarter, 2002, to the third quarter, 2002, and will continue to submit their ANI lists to Global Crossing each calendar quarter thereafter.

20. Plaintiff has also submitted demands to Global Crossing for payment of the payphone compensation owed to it, in the form of invoices and other demands for payment.

21. Although Global Crossing has made some partial payments of payphone compensation to Plaintiff, Global Crossing has failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted its ANT lists and invoices, in amounts to be proven at trial. Attached hereto as Exhibit A is a chart showing the amount payable by Global Crossing to Plaintiff for the period of the first quarter, 2002, through the third quarter, 2002, together with the amount paid and the balance owing, including interest.

22. Inasmuch as Global Crossing continues to accrue liability to pay payphone compensation to Plaintiff, Plaintiff reserves the right to amend its complaint prior to and/or after trial to allege the amounts owing as of the date of trial.

23. Despite sufficient demand from Plaintiff, Global Crossing's willful refusal to pay the full amount of payphone compensation to Plaintiff or to provide a proper accounting to Plaintiff has continued over many months and years. In the meantime, Global Crossing has reaped substantial profits from the calls placed from Plaintiff's payphones. Furthermore, Global Crossing has collected millions of dollars in payphone surcharges from its customers, which were imposed for the specific purpose of providing funds from which Global Crossing could make payment to the PSP of the payphone compensation Global Crossing owes to the PSP, including Plaintiff, yet Global

Crossing has failed and refused to pay over to Plaintiff the surcharges so collected.

FIRST CAUSE OF ACTION
VIOLATION OF TITLE 47, UNITED STATES CODE, AND REGULATIONS AND ORDERS OF THE FCC

24. Plaintiff realleges ¶¶ 1 through 23.

25. Global Crossing's failure and refusal to pay the full amount of payphone compensation owed to Plaintiff violates Section 276 of the Act and the regulations and/or orders issued by the FCC pursuant thereto.

26. Global Crossing's violations of Section 276 of the Act and the FCC regulations and orders requiring payment to Plaintiff of payphone compensation have caused substantial monetary damage to Plaintiff, in the amounts set forth on Exhibit A attached hereto and incorporated herein, such amounts to be proven at trial, together with such additional amounts as may accrue to the date of trial.

27. Under 47 U.S.C. § 206, Global Crossing is liable to Plaintiff for the full amount of damages sustained by Plaintiff in consequence of Global Crossing's violations of Section 276 of the Act and the FCC regulations and/or orders issued pursuant thereto.

28. The FCC has required that a carrier that fails to pay the full amount of payphone compensation by the required due date must pay interest on the unpaid balance at the rate of 11.25% per annum. Accordingly, Global Crossing owes Plaintiff prejudgment interest on the unpaid payphone compensation at the rate of 11.25%, beginning as of the first day of the quarter following the submission by Plaintiff to Global Crossing of an ANI list.

Alternatively, Global Crossing owes Plaintiff pre-judgment interest at the maximum rate permitted under applicable state law.

29. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206.

SECOND CAUSE OF ACTION
QUANTUM MERUIT

30. Plaintiff realleges ¶¶ 1 through 29.

31. Plaintiff has rendered valuable business services to Global Crossing's benefit.

32. The value of Plaintiff's services rendered to Global Crossing has been set at 24 cents per call originated through Plaintiff's payphones via the "Dial Around" services described above Accordingly, as of the filing of this Complaint, Plaintiff is entitled to the amounts outlined on Exhibit A attached hereto.

33. Because Global Crossing has not compensated Plaintiff 24 cents per call for all calls routed over its network from plaintiff's payphones, Global Crossing has not only been unjustly enriched in the amounts outlined on Exhibit A, but should be required to pay interest at 11 25% per annum for late payment, pursuant to orders/regulations of the FCC.

34. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206.

WHEREFORE, Plaintiff prays for judgment against Global Crossing as follows:

1. On the First Cause of Action, for all payphone compensation owed by Global Crossing to Plaintiff under regulations and orders of the FCC, in the amounts set forth on Exhibit A attached hereto, together with such additional amounts as may accrue to the date of the trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

2. On the Second Cause of Action, for the amounts set forth on Exhibit A attached hereto, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

V. DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues that may be tried to a jury.

DATED this 17th day of March, 2003.

KELLER ROHRBACK L.L.P.

By /s/ David J. Russell
David J. Russell, WSBA #17289
Attorneys for Plaintiff
Metrophones Telecommunications, Inc.

Metrophones Telecommunications, Inc.
2020 124th Avenue NE, Suite C-103
Bellevue, WA 98005
(425) 869-7551

Statement of Account
As of 3-31-03

DESCRIPTION (PREVIOUSLY BILLED AND UNPAID DIAL AROUND) BY BULLETINS

Global Crossing Telecommunications, Inc.
180 S. Clinton Avenue
Rochester, NY 14646
(716) 777-8456

Period	Call Count	Rate	Due	Payments
1Q2002 (Jan. 28-Mar. 31)	35684	$0.24	$ 8,564.16	$4,455.48
2Q2002	56894	$0.24	$ 13,654.56	7,240.44
3Q2002	127664	$0.24	$ 30,639.36	$6,957.48

Percent	Disputed	Interest	Owed
52.02%	$1,026.48	$260.06	$3,342.26
53.03%	$1,596.00	$271.02	$5,089.14
22.71%	$1,409.28	$626.42	$22,899.02
		Total Due	**$31,330.42**

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation, Plaintiff, v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation, and UNIDENTIFIED COMPANIES I THROUGH X, Defendants.	No. C03-0694P PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR LEAVE TO AMEND COMPLAINT (Filed Oct. 20, 2003) **Note For Motion Calendar: October 24, 2003; Motion for leave to Amend Complaint – October 29, 2003**

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I. INTRODUCTION

Defendant Global Crossing Telecommunications, Inc. ("Global Crossing") is a long distance carrier based in Michigan. According to its own website, it had service revenue of $2,878,000,000 in 2002. Plaintiff Metrophones Telecommunications, Inc. ("Metrophones") is a small company located in Bellevue, Washington. Metrophones owns payphones located throughout the western United States.

Pursuant to 47 U.S.C. § 276 (and other sections of the Telecommunications Act of 1976 ("the Act")), Global Crossing must fairly compensate Metrophones and all other payphones service providers (or "PSPs") "for each and every completed intrastate and interstate call using their payphone. . . ." This lawsuit is about Global Crossing's failure to compensate Metrophones for approximately 130,000 calls that were placed from payphones owned by Metrophones and completed over Global Crossing's network.

Defendant's motion is a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Thus, for purposes of this motion, this Court must assume that *all* of the allegations in plaintiff's Complaint are true. *Ludahl v. Seaview Boat Yard, Inc.*, 869 F. Supp. 825, 826 (W.D. Wash. 1994). This means that this Court must assume that (1) Global Crossing has failed to pay Metrophones for approximately 130,000 calls that originated from Metrophones' payphones and were completed over Global Crossing's network; (2) the value of those telephone calls was and is 24¢ per call; and (3) Global Crossing has been unjustly enriched as a result of its failure to pay Metrophones for the telephone calls at issue. *See* Plaintiff's

Complaint at ¶¶ 21 and 31-34 and Ex. A thereto. In light of these necessary assumptions, Global Crossing's motion must be denied for at least three reasons. First, the recent opinion from a three-judge panel of the Ninth Circuit upon which Global Crossing's motion is based is the subject of a petition for *certiorari*, which will be filed in the near future. *See* the accompanying Declaration of Floyd A. Jensen (counsel for plaintiffs in *Greene v. Sprint Communications*, 340 F.3d 1047 (9th Cir. 2003) ("*Greene*"). Any ruling on the viability of plaintiff's first cause of action – which is based Global Crossing's violations of 47 U.S.C. § 276 – should be stayed pending the outcome of the plaintiffs' petition for *certiorari* in *Greene*.

Second, the three-judge panel's decision in the *Greene* case was simply wrongly decided. Section 207 of the Act specifies, in relevant part, that "[a]*ny person claiming to be damaged by any common carrier* . . . may either make complaint to the Commission as hereinafter provided for, or *may bring suit for the recovery of the damages for which the common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction.*" 47 U.S.C. § 207 (emphasis added). Thus, the language of § 207 of the Act directly contradicts the three-judge panel's decision that there is no express or implied private right of action for a violation of § 276 of the Act. *FCC's In re The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-128 at ¶ 32 (October 3, 2003) (Ex. A hereto) ("[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of

the Act"); *Maydak v. Bonded Credit*, 96 F.3d at 1334 ("[i]f Maydak had sued AT&T [a common carrier] for a violation of a stated statutory provision, the district court clearly would have had subject matter jurisdiction under § 207"); *APCC Servs., Inc. v. Cable & Wireless, Inc.* ___ F. Supp. 2d ___, No. 02-0158, 2003 WL 22111268, at *4 (D.D.C. Sept. 3, 2003) (Ex. B hereto) ("the Court concludes that plaintiffs have a right of action to challenge defendant's alleged failure to meet the dial-around compensation obligations imposed by section 64.1300 [one of the FCC's implementing regulations], and will therefore deny C&W's 12(b) motion to dismiss").

Finally, Global Crossing's motion should be denied because (1) even if this Court were to find that Metrophones does not have a private right of action for Global Crossing's violation of § 276 (which was the only issue decided by the Ninth Circuit Court of Appeals in the *Greene* case), Metrophones should be permitted (and is hereby moving pursuant to Fed. R. Civ. P. 15(a)) to amend its complaint to add causes of action (a) for Global Crossing's alleged violations §§ 201, 407, and 416(c) of the Act; and (b) for Global Crossing's alleged breach of an implied contract, for an accounting, and for Global Crossing's alleged negligence (all state law causes of action); (2) plaintiff's original complaint included a viable state law claim for unjust enrichment; and (3) there can be no preemption of Metrophones' state law claims because those claims are not at all "inconsistent with the Commission's regulations"[1] – as would be required for this Court to dismiss (as Global Crossing is requesting) Metrophones'

[1] Defendant's Motion at p. 5, line 18.

state law claims *with prejudice.* For all of these reasons, plaintiff's motion for judgment on the pleadings must be denied.

II. FACTS

A. For Purposes of Defendant's Motion, All of the Allegations in Plaintiff's Complaint Must Be Accepted as True.

Global Crossing acknowledges, at page three of its motion, that whenever a defendant (such as Global Crossing) files a Rule 12(c) motion for judgment on the pleadings, the Court must assume that "the non-moving party's material facts are true as pleaded."[2] Thus, for purposes of this motion, it must be assumed that "Global Crossing has failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted ANI lists and invoices, in amounts to be proven at trial." Plaintiff's Complaint at ¶ 21. It also must be assumed that "[t]he value of Plaintiff's services rendered to Global Crossing has been set at .24 [sic] cents per call originated through Plaintiff's payphones via the "Dial Around Services described above" and that "Global Crossing has . . . been unjustly enriched in the amounts outlined on Exhibit A." Plaintiff's Complaint at ¶¶ 32-33.

At the time that the undersigned signed and filed plaintiff's Complaint, he attached a "Statement of Account" that alleged that Global Crossing had failed to pay Metrophones $31,330.42 for previously billed and unpaid "dial around" phone calls placed from payphones owned by

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[2] Defendant's Motion at p. 3, lines 8-13.

Metrophones.[3] In addition, Metrophones outlined the number of completed calls for which Global Crossing had paid Metrophones and the number (approximately 130,000) of completed calls for which Global Crossing had simply refused to pay. *See* Ex. A to Plaintiff's Complaint. Again, for purposes of the present motion, all of these allegations have been accepted by Global Crossing – for purposes of the present motion – as being true.

B. Defendant Itself Has Asserted a State Law Claim for Alleged Unjust Enrichment.

In its recitation of the "facts" in the present motion, Global Crossing mentioned, but did not emphasize, that its own counterclaims (which it asserted in this matter on April 22, 2003) include a state law counterclaim for unjust enrichment.[4] Thus, when it brought its own counterclaims, Global Crossing did not believe that state law claims were somehow preempted by the Telecommunications Act. Given Global Crossing's own assertion of an unjust enrichment claim, Global Crossing should be estopped from arguing – as it has at pp. 4-6 of its current motion – that "Section 276 [of the Act] preempts claims such as quantum meruit based in state law."[5]

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[3] "Dial around" phone calls are those placed from a pay phone where the caller uses a toll-free number or some other number for which the caller is not required to deposit coins into the pay phone. Under the Telecommunications Act, the carrier that has the "dial around" call at issue must compensate the owner of the payphone for such calls. *See* 47 U.S.C. § 276.

[4] Defendant's Answer, Affirmative Defenses and Counterclaims at p. 11, lines 4-15.

[5] Defendant's Motion at p. 6, lines 7-8.

III. ARGUMENT

A. The Plaintiffs in the Greene v. Sprint Matter Have Filed Petition for *Certiorari.*

Global Crossing's motion for judgment on the pleadings (directed to plaintiff's original complaint) is based almost entirely upon an opinion recently issued by a three-judge panel of the Ninth Circuit Court of Appeals – *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003) – a opinion that was issued on *August 25* of this year. This opinion is still being appealed by the plaintiffs in *Greene*. Although the Ninth Circuit Court of Appeals recently denied plaintiffs' motion for a rehearing en banc, the plaintiffs in *Greene* will be filing a petition for *certiorari* in the United States Supreme Court in the near future. *See* the accompanying Declaration of Floyd A. Jensen at ¶ 3.

Because the law in this area is not settled and because the *Greene* decision is still being appealed, Metrophones respectfully asks this Court to postpone any decision in this matter that might be based upon the three-judge panel's decision in *Greene* pending the outcome of plaintiffs' petition for *certiorari* in *Greene* matter. The undersigned will endeavor to notify this Court as soon as he is notified of a ruling on plaintiffs' petition for *certiorari* in the *Greene* matter.

B. The Three-Judge's Panel's Decision in *Greene* Was Wrongly Decided.

Postponing a ruling on the private right of action (under § 276 of the Act) issue is important because the decision of the three-judge panel in *Greene* was simply wrongly decided. It was wrongly decided because there are

two independent bases for finding a private right of action for recovery of payphone compensation under Section 276. First, Sections 206 and 207 of the Act – 47 U.S.C. §§ 206 & 207 – expressly provide a private right of action for violations of the Act and the FCC's implementing regulations. Thus, Global Crossing's failure to pay the compensation required by Sections 64.1300-01 of the FCC's rules and by 47 U.S.C. 276 is actionable under Sections 206 and 207 of the Act. Second, under the governing test announced by the Supreme Court, there must be an implied right of action under Section 276 of the Act. Both points were confirmed by the FCC on October 3, 2003 (six weeks *after* the three-judge panel issued its decision in *Greene*) when it issued an order in which it specified that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, *constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.*" *FCC's In re The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-128 at ¶ 32 (October 3, 2003) (Ex. A hereto) (emphasis added). This recent ruling is important because it is black letter law that "the construction of a statute by those charged with its administration [as the FCC was charged by § 276(a) of the Act] is entitled to substantial deference." *United States v. Rutherford*, 442 U.S. 544, 553 (1979).

1. Sections 206 And 207 Provide An Express Cause Of Action Against Global Crossing For Its Violations Of The Act And The FCC's Implementing Regulations.

Congress, in enacting Sections 206 and 207 of the Act, expressly authorized suits against carriers (such as Global

Crossing) for violations of the Act.[6] The Supreme Court has held that violations of federal agency regulations (such as the FCC's regulations requiring payments from carriers to PSPs for all completed calls) can be enforced through private actions to the same extent as the statute they implement. *Alexander v. Sandoval*, 532 U.S. 275 (2001). In addition, the Ninth Circuit Court of Appeals has previously held that violations of the Act are actionable under Sections 206 and 207. *See Maydak v. Bonded Credit Co., Inc.*, 96 F.3d 1332 (9th Cir. 1996).

(a) It is "meaningless" to talk about a cause of action under 47 C.F.R. §§ 64.1300-01 in isolation from Section 276.

In an effort to defeat plaintiff's clear right of action under Sections 206 and 207, Global Crossing only focuses on the *Greene* decision and argues that the *Greene* decision stands for the proposition that "there is no private right of action, either explicitly [sic] or implied, under Section 276 of the Telecommunications Act."[7] This argument ignores the fact that Metrophones' first cause of action is for "Global Crossing's violations of Section 276 of the Act *and*

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[6] Section 206 provides that if a common carrier "shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter." 47 U.S.C. § 206. Section 207 then affords the injured party the opportunity to "bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court or the United States of competent jurisdiction." 47 U.S.C. § 207.

[7] Defendant's Motion at p. 3, lines 17-18.

the FCC regulations and/or orders issued pursuant thereto."[8] In enacting Section 276, Congress explicitly conferred on PSPs a new right to be "fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." 47 U.S.C. § 276(b)(1)(A). Rather than attempt to micromanage the details of that compensation scheme, however, Congress left implementation to the FCC, and ordered the agency to adopt regulations within nine months. 47 U.S.C. § 276(b)(1). The regulations adopted by the FCC in furtherance of that mandate, including 47 C.F.R. §§ 64.1300-01, are thus functionally a part of the statute itself. The regulations implement Congress' statutory mandate through powers expressly delegated to the FCC:

> As with the . . . regulations [at issue in *Alexander*], "it is meaningless to talk about a separate cause of action to enforce" the FCC regulation at 47 C.F.R. § 64.1300 apart [from] its authorizing statute, 47 U.S.C. § 276(b)(1)(A). A suit to enforce the rights of PSPs under § 276(b)(1)(A) to be "fairly compensated" would be meaningless without the FCC regulation which specifies the precise level of that compensation.

Precision Pay Phones v. Qwest Communications Corp., 210 F. Supp. 2d 1106, 1115 (N.D. Cal. 2002), *quoting Alexander*, 532 U.S. at 284. The touchstone under *Alexander* for whether agency regulations are encompassed within a private right of action to enforce violations of their parent statute is whether the regulations "authoritatively construe the statute itself." 532 U.S. at 284. Here, 47 C.F.R. §§ 64.1300-01 do *more* than "authoritatively construe"

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[8] Plaintiff's Complaint at ¶ 27 (emphasis added).

Section 276 – the regulations, as directed by Congress, provide the entire substance of the right created by Congress. Without the regulations, the right to fair compensation would be meaningless, and without the statute, the regulations would be groundless. Thus, the proper inquiry is not whether a violation of Section 276, standing alone, or a violation of its implementing regulations, on their own, is actionable under Sections 206 and 207. Rather, the proper inquiry is whether there is a cause of action under the comprehensive scheme set forth by Congress, including both Section 276 and the regulations it charges the FCC with adopting to meet Congress' directive that PSPs receive "fair[] compensation." *Precision Pay Phones*, 210 F. Supp. 2d at 1115 ("the right of action conferred under §§ 206 and 207 applies not only to [Section 276] but to implementing the FCC regulations as well").

If there were no private right of action under Sections 206/207, then Section 276's mandate that PSPs receive fair compensation would be illusory. Otherwise, the statutory scheme, would lead to the illogical result that the PSPs could not bring an enforcement proceeding even before the FCC. The only enforcement mechanism available would be an FCC-initiated action against a carrier. The FCC, however, is not in a position to police the hundreds of carriers paying compensation to thousands of PSPs and, even if it were, there is no mechanism by which it could recover monies owed by the carriers to PSPs. Any fines it can levy for violations of the Act and its rules are paid to the United States Treasury, not to parties damaged by carrier violations. 47 U.S.C. § 504. Thus, PSPs would have no means of redressing Global Crossing's failure to comply with the statutory mandate, implemented through the FCC regulations, entitling Metrophones and all other

PSPs to fair compensation. This cannot be the law in this area.

(b) Violations of FCC regulations implementing the Act are enforceable through Sections 206/207 to the same extent as the underlying statutory provision they implement.

Even if the regulations are viewed in isolation, the Supreme Court in *Alexander* made clear that federal agency regulations can be enforced through private actions. There, the Court held that regulations implementing the ban on intentional discrimination set forth in Section 601 of Title VI of the Civil Rights Act of 1964 "are covered by the cause of action to enforce that section." *Alexander*, 532 U.S. at 284-85. It so held because "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 284[9]; *see Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 536 (9th Cir. 1984) ("[I]f the rule in question is valid and furthers the substantive purposes of the enabling statute, and the statute provides a private right of action as a matter of congressional intent, we will imply the private right of action into the rule as well.").

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[9] While the Court ultimately held that the regulations were not enforceable, it did so because they were not limited to intentional discrimination and, therefore, exceeded the scope of the agency's statutory authorization. *Alexander*, 532 U.S. at 285-86. The FCC regulations at issue here, 47 C.F.R. §§ 64.1300-01, by contrast unquestionably are within the scope of the authorizing statute.

The D.C. Circuit in *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) applied this general rule (that agency regulations can be enforced through private actions to the same extent as the statute they implement) to FCC regulations implementing the Communications Act. In *MCI*, the Court of Appeals held that a violation of the maximum rates of return set by the FCC was a violation of Section 201's requirement that rates be "just and reasonable," and, therefore, was actionable under Sections 206/207. 59 F.3d at 1413-14. Thus, under both *Alexander* and *MCI*, Metrophones may assert a private right of action for Global Crossing's violation of the FCC's regulations (even if there is no express private right of action outlined in § 276 of the Act itself).

2. Alternatively, There Is An *Implied* Private Right Of Action Under Section 276.

Not only is there an express right of action for violations of Section 276 and the FCC's implementing regulations under Sections 206/207, the Act's general private right of action provisions, but an implied private right of action exists **directly** under Section 276 itself. In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Supreme Court established a four factor test to determine whether an implied right of action for violation of a statute exists: (1) whether the plaintiff is part of "the class for whose especial benefit the statute was enacted;" (2) whether there is **any** indication of "legislative intent, explicit or implicit, either to create such a remedy or to deny one;" (3) whether inferring such a right is "consistent with the underlying purposes of the legislative scheme;" and (4) whether the "cause of

action is one traditionally relegated to state law." All of the *Cort* factors are satisfied in this case.

First, PSPs are "the class for whose especial benefit [Section 276] was enacted." Section 276 declares that its express purpose is "to promote competition among PSPs and promote the widespread deployment of payphones," and that, in order to meet those dual objectives, the FCC "shall . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." 47 U.S.C. § 276(b)(1). Thus, not only was Section 276 enacted for the benefit of the PSPs, but the very means it provides for their protection is the subject of this lawsuit. *See Precision Pay Phones*, 210 F. Supp. 2d at 1115 (Section 276 "creates a right to fair compensation and focuses specifically on the individuals to be protected – 'all payphone service providers' ").

Second, while the legislative history of Section 276 is silent with respect to whether Congress intended "either to create . . . a remedy [for violation of Section 276] or to deny one," it is implicit in the statute's purpose and structure that Congress intended to create one. The Supreme Court "has found that Congress intended to create a cause of action 'where the language of the statute explicitly confers a right directly on a class of persons that includes the plaintiff in the case.' " *Universities Research Ass'n. v. Coutu*, 450 U.S. 754, 771-72 (1981), *quoting Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979) (where the Court in that footnote also noted that "the right – or duty – creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action"). Section 276 confers just such

a right directly on the PSPs – the right to be fairly compensated for every call.

Third, inferring a private right of action here not only is "consistent with the underlying purposes of the legislative scheme," but is particularly appropriate if the newly-created right is to be adequately protected. As discussed above, if no private right of action is available to remedy violations of Section 276, Congress' directive that PSPs be "fairly compensated" would be illusory. Moreover, as noted above, the right to fair compensation under Section 276 cannot be divorced from Sections 206/207 of the Act, which provide for rights of action against carriers for violations of the Act. In mandating "fair compensation" for "each and every call," Congress was aware that, under an earlier statute, 47 U.S.C. § 226(e), the FCC had **already** imposed a payphone compensation obligation on carriers, albeit for only some, but not all dial-around calls. Given the existence of Sections 206/207, providing for private rights of actions against carriers for violations of the Act, it must be presumed that Congress intended, or at the very least was accepting of, the notion that a violation of Section 276 would be enforceable against carriers. *See Precision Pay Phones*, 210 F. Supp. 2d at 1115 (the existence of Sections 206/207 is probative of Congress' intent to create a private right of action against carriers under Section 276). Had Congress intended to create a right without a remedy, it would have made that intention clear and excluded PSPs from the class of persons entitled to invoke Sections 206/207. In addition, courts may infer congressional intent to allow an implied remedy where, as here, a remedy is "necessary or at least helpful to the accomplishment of the statutory purpose." *Cannon v. Univ. of Chicago*, 441 U.S.

at 703 (finding that the Court is "decidedly receptive" to such a remedy).

Finally, the fourth *Cort* factor is satisfied because the cause of action here is not one "traditionally relegated to state law, in an area that is basically the concern of the states. . . ." *Cort*, 422 U.S. at 78. Indeed, the payphone compensation obligation at issue is entirely a creature of federal law.

For all of these reasons, Metrophones believes that the three-judge panel's decision in *Greene* was wrongly decided and will be reversed (if, and when, plaintiffs' petition for *certiorari* is granted) by the United States Supreme Court. In light of the significant body of law in Metrophones' favor on this issue, Metrophones again asks this Court to postpone – pending the outcome of plaintiffs' petition for *certiorari* in *Greene* matter – any decision that might be based upon the three-judge panel's decision in *Greene*.

C. There Is No Preemption Here

Even if this Court feels compelled to immediately implement the narrow holding of the three-judge panel in *Greene* (on the issue of whether there is a private right of action under § 276 of the Act), Global Crossing's motion also requests that this Court dismiss, *with prejudice*, all state law claims that Metrophones might assert against it for its admitted – for purposes of this motion – failure to pay Metrophones for approximately 130,000 in compensable calls. This second half of Global Crossing's motion is completely without merit.

Taken as a whole, Global Crossing's motion asks this Court to dismiss Metrophones' cause of action under § 276 of the Act and *then* asks this Court to dismiss all of Metrophones' state law causes of action *with prejudice*. Thus, Global Crossing would have this Court hold that (1) it can fail to pay PSPs for compensable calls; and (2) the PSPs cannot sue Global Crossing for that failure to pay in either federal court or in state court. Such an outcome should be unpalatable to this Court.

At page five of its motion, Global Crossing acknowledges that the preemption language of the Act only specifies that state law is preempted "[t]o the extent that any State requirements are *inconsistent* with Commission's regulations."[10] *See* § 276(c) of the Act. Global Crossing then cites *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), as if that case supports a finding of preemption in this case. It does not.

The *Illinois* case is a case in which the plaintiffs were challenging the FCC's authority to set rates for *intrastate* local coin calls. In other words, in the *Illinois* case, there was no question but that the plaintiffs claim (if sustained) would have been completely inconsistent with the FCC's regulations. Indeed, the decision in the *Illinois* case upon which Global Crossing's motion is based is nothing more than a jurisdictional decision. The Court of Appeals there merely held that "[b]ecause . . . there is no indication that the Congress intended to exclude local coin rates from the term 'compensation' in § 276, we hold that *the statute unambiguously grants the Commission authority to regulate*

[10] Defendant's motion at p. 5, lines 17-19 (emphasis added).

the rates for local coin calls." 117 F.3d at 562 (emphasis added).

By contrast, Metrophones' state law causes of action[11] are not at all inconsistent with the provisions of the Act or with the FCC's implementing regulations and Global Crossing has made no attempt to demonstrate or argue that they are. Global Crossing's motion also fails to recognize the existence of the Act's "savings clause," which can be found at 47 U.S.C. § 414. That provision specifies that "[n]othing in this chapter shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." When faced with the same preemption issue that is before this Court, the District Court in *Precision Pay Phones* (210 F. Supp. 2d 1106 (N.D. Cal. 2002)), held that:

> Clearly § 414 is intended to preserve state law to the extent feasible. Thus, while [] § 276(b)(1)(A) of the Telecommunications Act may be enforced in a suit in federal court, there is nothing to suggest Congress intended this mode of enforcement to be to the exclusion of claims in state courts. As demonstrated by the limited scope of the preemption provision of § 276(c) and the savings clause of § 414, state court enforcement was not of such "central concern to the federal statute," *Franchise Tax Board*, [463 U.S. 1, 25-26 (1983)], so as to evince Congress' intent to completely displace state court jurisdiction over suits to collect dial-around compensation.

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[11] Metrophones asserted an unjust enrichment claim in its original complaint and has asserted three additional state law causes of action in its amended complaint.

210 F. Supp. 2d at 1117. Metrophones respectfully submits that any application of the "inconsistent with the Commission's regulations" language of § 276(c) to the state law causes of action outlined in Metrophones' amended complaint confirms that those causes of action are viable causes of action and are not preempted by the Act. Again, for purposes of this motion, it must be assumed that Global Crossing has failed to pay for approximately 130,000 compensable dial around calls made from payphones owned by Metrophones. A cause of action asserting that Metrophones is entitled to recover in equity for those compensable calls (pursuant to an unjust enrichment or breach of implied contract cause of action) is not at all consistent the FCC's implementing regulations that provide that "the first facilities-based interexchange carrier [such as Global Crossing] to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call . . . at a per-call rate of $.24." 47 C.F.R. § 64.1300(a) and (c).

In short, even if this Court were to decide that Metrophones does not have a private right of action under § 276 of the Act and the FCC's implementing regulations, Metrophones should be allowed to proceed (either in this Court or in state court) with a cause of action in equity for the recovery of funds that are assumed – for purposes of this motion – to be due and owing. *See Precision Pay Phones*, 210 F. Supp. 2d 1106; *Braco v. MCI WorldCom Communications, Inc.*, 138 F. Supp. 2d 1260, 1269 (C.D. Cal. 2001); *Heichman v. American Tel. & Tel. Co.*, 943 F. Supp. 1212, 1222 (C.D. Cal. 1995) (finding that the Telecommunications Act did not transform the Plaintiff's state law causes of action into a federal cause of action);

Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 816 (N.D. Cal. 1991) (finding that neither the Telecommunications Act's statutory language nor its legislative history supports the proposition that Congress intended complete preemption).

D. Metrophones' Motion for Leave to File and Serve the Attached Amended Complaint.

In addition to opposing Global Crossing's motion to dismiss its claims with prejudice, Metrophones respectfully asks that this Court grant it leave to file and serve the amended complaint that is attached hereto as Exhibit B.[12] Pursuant to Fed. R. Civ. P. 15(a), "[l]eave [to amend a complaint] shall be freely given when justice so requires." This is exactly the type of situation where justice requires that leave be given to file an amended complaint. When Metrophones filed its initial complaint, neither the Ninth Circuit Court of Appeals (nor any district court within the Ninth Circuit to the undersigned's knowledge) had held that there was no private right of action under § 276 of the Act and/or the FCC's implementing regulations.[13] The attached amended complaint simply asserts causes of action for Global Crossing's alleged violation of §§ 201, 407, and 416(c) of the Act – none of which were at issue in the *Greene* matter. In addition, the attached amended

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[12] Metrophones has filed a separate motion to shorten time to ensure that its Motion for Leave to File Amended Complaint can be heard at the same time as Global Crossing's motion.

[13] Indeed, the original order in the *Greene* case was entered *sua sponte* and the defendant (Sprint) did not file an opposition brief when that order was appealed to the Ninth Circuit Court of Appeals. At oral argument before the Ninth Circuit, no one argued that a private right of action does not exist. Declaration of Floyd A. Jensen at ¶ 4.

complaint asserts state court causes of action for Global Crossing's breach of an implied contract, for an accounting, and for Global Crossing's negligence. As outlined above, none of these state court causes of action are inconsistent with the provisions of the Act.

1. Metrophones' Amended Complaint States A Claim For Violation Of 47 U.S.C. § 407 and 416(c).

In its proposed amended complaint, Metrophones has asserted, among others, causes of action for Global Crossing's alleged violations of Section 407 and 416(c) of the Act, which provide, in pertinent part, that:

> [47 U.S.C. § 407] If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.
>
> . . . .
>
> [47 U.S.C. § 416(c)] It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply

> with such [Commission] orders so long as the same shall remain in effect.

Thus, Section 407 of the Act provides persons with the right to file a District Court action to enforce an FCC "order" for the payment of money. In *APCC, Inc. v. Allnet Communications Serv., Inc.*, No. 93-0034, 1993 WL 544300 (D.D.C. Dec. 20, 1993), *vacated on other grounds*, 959 F. Supp. 19 (D.D.C. 1997) – a case almost identical to the one before this Court – the American Public Communications Council ("APCC"), brought suit under Section 207 (as well under Section 207 for violation of Section 416) for the non-payment of dial – around compensation. Allnet moved to dismiss, *inter alia*, on the ground that the word "order" in Section 407 includes only adjudicatory orders. After extensive briefing, Judge Oberdorfer not only denied Allnet's motion to dismiss, but entered summary judgment in APCC's favor. 1993 WL 544300 at **1-2.

As for Section 416(c), that section also makes violations of FCC orders violations of the Act. *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Commission*, 744 F.2d 1107, 1117, n.18 (5th Cir. 1984), *vacated on other grounds*, 476 U.S. 1166 (1986) ("Violating rules and regulations of the FCC . . . is violative of the Act.") (*citing* 47 U.S.C. § 416(c)). Because violations of FCC orders are a violation of the Act, Metrophones can seek damages Global Crossing's failure to pay pursuant to Sections 416(c), 206 and 207. Although Global Crossing may try to argue that the word "orders" in Section 416(c) refers to adjudicatory orders only, and does not encompass orders promulgated pursuant to the FCC's rulemaking authority, this is not the law in this Circuit. *See Hawaiian Tel. Co. v. Public Util. Comm'n.*, 827 F.2d 1264, 1271-72 (9th Cir. 1987), *cert.*

denied, 487 U.S. 1218 (1988). The court in *Hawaiian Tel.* reasoned that,

> [T]he language of other sections of the Communications Act shows that Congress did not intend to limit § 401(b) exclusively to adjudicatory orders as the APA defines them. When Congress intended the APA's definition of a given term to be incorporated into the Communications Act, it said so. E.g., 47 U.S.C. §§ 409(a)-(c) (incorporating APA's definition of adjudication).

827 F.2d at 1271. Since the APA's definition of "orders" is not incorporated into Section 416(c), this Court, like the large majority of circuit Courts,[14] should interpret the term broadly to include orders promulgated pursuant to the FCC's rulemaking authority.

Finally, in another case that is virtually identical to the case before this Court, the District Court for the District of Columbia very recently granted a plaintiff's motion to amend its complaint to add causes of action under for a carrier's alleged violations of sections 407 and 416(c). *APCC Servs., Inc. v. Cable & Wireless, Inc.*, ___ F. Supp. 2d ___, No. 02-0158, 2003 WL 22111268, at *6 (D.D.C. Sept. 3, 2003) (Ex. B hereto) ("[t]his Court agrees that the word 'order' should not be so narrowly construed,

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[14] *Utel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir. 1990); *Cheasapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 748 F.2d 879, 880-81 (4th Cir. 1984), *vacated on other grounds*, 476 U.S. 445 (1986); *South Cent. Bell v. Louisiana*, 744 F.2d at 1115; *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n.*, 740 F.2d 566, 571 (7th Cir. 1984); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (8th Cir. 1984), *vacated on other grounds*, 476 U.S. 1167 (1986). *See also MGC Communications, Inc. v. BellSouth Telecomm. Inc.*, 146 F. Supp. 2d 1344, 1353 (S.D. Fla. 2001).

and believes that a violation of FCC regulations regarding dial-around compensation is the kind of violation that Congress intended to prescribe [sic] when it enacted sections 416(c) and 407").

In conclusion, orders promulgated pursuant to the FCC's rulemaking authority are encompassed within Section 407 and Section 416(c)'s language. The *Pay Tel Reclassification and Compensation Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-388, Report and Order, 11 FCC Red. 20541 (FCC 1996) and subsequent related FCC orders, require long distance companies, including Global Crossing, to pay money, i.e., dial-around compensation, to PSPs for all compensable calls. These orders are "orders[s] for the payment of money" that can be enforced in United States district court pursuant to causes of action under Sections 407 and 416(c) of the Act.

2. Metrophones' Amended Complaint Also States A Claim for Global Crossing's Alleged Violation of 47 U.S.C. § 201(b).

Finally, Metrophones' Amended Complaint states a claim for Global Crossing's alleged violation of Section 201(b) of the Act. That section provides, in relevant part, that:

> All charges, practices, classifications, and regulations for and in connection with such communication service [to be provided by common carriers such as Global Crossing] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable *is declared to be unlawful.*

47 U.S.C. § 201(b) (emphasis added). When combined with the provisions of sections 206 and 207 of the Act – which expressly allow a PSP to file suit in federal court "[i]n case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful" – the language of section 201(b) of the act requires a carrier (such as Global Crossing) to conduct itself in a just and reasonable way. If it does not act in a just and reasonable way, a person or entity harmed the carrier's conduct may bring a federal action (as authorized by sections 206 and 207). *In re The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 at ¶ 32 (FCC October 3, 2003) (Ex. A hereto) ("[a] *failure to pay in accordance with the Commission's payphone rules*, such as the rules expressly requiring such payment that we adopt today, *constitutes* both a violation of section 276 and *an unjust and unreasonable practice in violation of section 201(b) of the Act*") (emphasis added); *APCC v. Cable & Wireless*, ___F. Supp. 2d ___, No. 02-0158, 2003 WL 22111268 (Ex. B hereto) ("although the section 201(b) claim appears not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276 and its implementing regulations, the Court will allow this amendment").

IV. CONCLUSION

For all the reasons outlined above, Global Crossing's motion for judgment on the pleadings should be denied in its entirety. In addition, Metrophones' motion for leave to amend its complaint (Ex. C hereto) should be granted.

DATED this 20th day of October, 2003.

KELLER ROHRBACK L.L.P.

By /s/ David J. Russell
David J. Russell, WSBA #17289
Attorneys for Plaintiff Metrophones Telecommunications, Inc.

EXHIBIT C

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELE-COMMUNICATIONS, INC., a Washington corporation, Plaintiff, v. GLOBAL CROSSING TELE-COMMUNICATIONS, INC., a Michigan corporation, and UNIDENTIFIED COMPA-NIES I THROUGH X, Defendants.	No. C03-0694P PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Metrophones Telecommunication, Inc. ("Metrophones") (hereinafter referred to as "Plaintiff") complains of Defendant Global Crossing Telecommunications, Inc. ("Global Crossing") and Unidentified Companies I through X (jointly referred to herein as "Defendants") as follows:

INTRODUCTION AND SUMMARY OF COMPLAINT

1. Under 47 U.S.C. § 276(b)(1)(A), 47 C.F.R. §§ 1300 et seq., and various orders of the Federal Communications Commission ("FCC") in Common Carrier Docket No. 96-128, Defendants, as carriers of various types of long distance communications, are required to compensate Plaintiff, as a payphone service provider ("PSP"), at the rate prescribed by the Federal Communications Commission ("FCC"), for each

and every compensable call, including but not limited to completed access code calls and toll free calls, that have been made at any time since January 29, 2002 from a payphone owned by Plaintiff and carried over Defendants' telephone network facilities. Such compensation is referred to herein as "per call compensation." Under certain circumstances specified by FCC orders, Defendants may pay Plaintiff per phone compensation in lieu of per call compensation. As used herein, the term "payphone compensation" includes both per call compensation and per phone compensation.

2. Many compensable calls placed from payphones owned by Plaintiff have been carried over Defendants' telephone networks, but Defendants have failed and refused to provide Plaintiff a full accounting of such calls, and have failed and refused to pay Plaintiff the full amounts of payphone compensation required to be paid under federal law, despite Plaintiff's, demands. Plaintiff seeks an accounting of the amounts of payphone compensation owed by Defendants for all compensable calls, and judgment for such amounts, interest, costs, and attorneys' fees as provided by law.

PARTIES

3. Plaintiff Metrophones is a payphone service provider with its headquarters and principal place of business located in Bellevue, Washington.

4. On information and belief, Defendants Global Crossing is a Michigan Corporation. Unidentified Companies I through X are other subsidiaries and/or affiliates of Defendants. Inasmuch as the complex structure of Defendants' family of companies makes it difficult to

ascertain which particular affiliates are responsible to pay payphone compensation to Plaintiff, as alleged herein, Plaintiff reserves the right to amend its complaint to specifically name such responsible parties, upon ascertainment of the identity thereof. Upon information and belief, all Defendants have acted in concert with respect to the matters alleged herein. As used hereinafter, the term "Defendants" refers to the affiliate or affiliates that are responsible for the payment of payphone compensation to Plaintiff, as alleged herein. Defendants do business in Washington and elsewhere in the United States.

5. Defendants are a common carrier as defined in 47 U.S.C. § 153(10). As such, Defendants are subject to regulation by the FCC under Title 47, U.S.C.

6. Defendants provide various telecommunications services to the public through its communications network that is accessible from Washington and elsewhere in the United States. Such services include the carriage over Defendants' telecommunications network of various types of calls placed from payphones, such as access code calls (calls made by first accessing Defendants' network through dialing a code number) and toll free calls (calls to a number, typically dialed in the pattern 1-800-xxx-xxxx, 1-888-xxx-xxxx, or 1-877-xxx-xxxx, for which the subscriber has previously agreed to pay the toll charges).

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States. Further, 47 U.S.C. § 207 grants subject matter jurisdiction of this action to this court.

8. Venue is proper in the United States District Court for the Western District of Washington, under 28 U.S.C. §§ 1391(b) and 1391(c), because Defendants are subject to personal jurisdiction in this district and hence are deemed to reside in this district.

PAYPHONE COMPENSATION UNDER FEDERAL LAW

9. As a PSP, Plaintiff makes its payphones available to the public to enable persons to make telephone calls. Plaintiff receives compensation for some types of payphone calls through direct payment by the caller (e.g. through the deposit of coins into the payphone) or through commission payments from Plaintiff's presubscribed carrier (the carrier to which 0+ calls are automatically routed by agreement between Plaintiff and such carrier). However, a substantial portion of calls placed from Plaintiff's payphones can be and are made without any compensation to Plaintiff from the caller or from Plaintiff's presubscribed carrier. Such calls include access code calls and toll free calls (all of which shall be referred to hereinafter as "coinless" calls) that are initiated from Plaintiff's payphones and are routed over various carriers' telecommunications networks and facilities, including those of Defendants. For coinless calls, the interexchange carrier receives payment through various means, including the use of calling cards, credit cards, debit cards, prepaid cards, and calls billed to another party (e.g., collect, third party, and toll free calls). Plaintiff is prohibited by law from blocking such calls from their payphones.

10. In February, 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). In relevant part,

the Act directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all independent payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. § 276(b)(1)(A).

11. Pursuant to the Act, the FCC has promulgated regulations and has issued orders that require carriers, including Defendants, to pay payphone compensation to PSPs such as Plaintiff for all completed coinless calls made from a payphone where the caller utilizes a carrier other than the payphone's presubscribed carrier. Such coinless calls include, without limitation, calls that are terminated on Defendants' own network and calls that are initially routed by the local exchange carrier to Defendants' network, and from Defendants' network are routed to other carriers and/or resellers for completion.

12. Pursuant to the Act, the FCC has issued orders establishing the default per call compensation rate (i.e. the rate that applies in the absence of an express contract between the PSP and the carrier) at $0.24 per call for all compensable calls made from and after April 21, 1999.

13. Pursuant to the Act, the FCC has promulgated regulations and has issued orders requiring each carrier, including Defendants, to track or arrange for the tracking of each compensable coinless call carried over its network.

14. Under FCC-approved procedures adopted by the telecommunications industry, PSPs, such as Plaintiff, provide to carriers, such as Defendants, or to their designated agent(s), on a calendar quarter basis, a list of the

telephone numbers of the payphones owned and operated by the PSP as of the end of the applicable calendar quarter ("ANI Lists"). Each such unique telephone number is referred to as an "ANI," which is the acronym for "Automatic Number Identification." The ANI is transmitted with each call made from a payphone, and is or should be recorded and stored by the carrier to whose network the call is routed. Other information is also transmitted to the carrier with each call, and such information may include payphone specific coding digits identifying as a payphone the telephone from which a call is made. The carrier can determine which calls carried over its network were made from which payphones by comparing the ANI Lists submitted by PSPs to the carrier's call detail records or other records maintained by the carrier identifying the ANI for each recorded call. By such means, the carrier can also determine to whom payment of payphone compensation should be made, and the amount of such payment.

15. Pursuant to FCC regulations, carriers, including Defendants, are required to remit payment of payphone compensation to PSPs on a quarterly basis.

16. Defendants also sell long distance service to other entities that resell such service, but do not own or lease their own switching facilities, and which are sometimes referred to as "switchless resellers." Under FCC orders and regulations, Defendants are responsible for payment of payphone compensation for all compensable calls routed to their switchless resellers.

17. Defendants also sell long distance service to other entities that resell such service, using their own switching facilities, and which are sometimes referred to as "facilities-based resellers" ("FBRs") or "switch-based

resellers" (SBRs"). Under FCC orders and regulations, Defendants are responsible for payment of payphone compensation for all compensable calls routed to their FRBS/SBRs except where a FBR/SBR has come forward and identified itself as being responsible for paying payphone compensation. To date, no FBR/SBR of Defendants have identified itself to Plaintiff as being responsible for paying payphone compensation.

18. From January 29, 2002 to the date of this Complaint, many compensable coinless calls have been made from the payphones of each Plaintiff, which have been routed by the applicable local exchange carrier to Defendants as the first facilities-based interexchange carrier. Some of such calls have been routed by Defendants to one or more resellers (both switchless resellers and FBRS/SBRs) for completion.

19. Plaintiff (through its agent, Bulletins) has submitted their ANI Lists to Defendants, or their respective designated agent or agents, for the calendar quarters beginning with the first quarter of 2002, and will continue to so submit their ANI Lists each calendar quarter hereafter.

20. Plaintiff (through its agent, Bulletins) has also submitted demands to Defendants for payment of the payphone compensation owed to them, in the form of invoices and other demands for payment.

21. Defendants have failed to track all compensable calls placed from Plaintiff's payphones as required by regulations and orders of the FCC.

22. Although Defendants have made some partial payments of payphone compensation to Plaintiff, Defendants

have failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted their ANI Lists and invoices, in amounts to be proved at trial.

23. Inasmuch as Defendants continue to accrue liability to pay payphone compensation to Plaintiff, Plaintiff reserves the right to amend their complaint prior to and/or after trial to allege the additional amounts that will have accrued prior to the date of trial.

FIRST CAUSE OF ACTION VIOLATION OF TITLE 47, UNITED STATES CODE, AND REGULATIONS AND ORDERS OF THE FCC

24. Plaintiff realleges ¶¶ 1 through 23.

25. Defendants' failures and refusal to (1) track compensable calls, from Plaintiff's payphones; and/or (2) pay the full amount of payphone compensation owed to Plaintiff violates Section 276 of the Act and the regulations and/or orders issued by the FCC pursuant thereto.

26. Defendants' violations of Section 276 of the Act and the FCC regulations and orders requiring payment to Plaintiff of payphone compensation have caused substantial monetary damage to Plaintiff, in amounts to be proven at trial.

27. Under 47 U.S.C. § 206, Defendants are liable to Plaintiff for the full amount of damages sustained by Plaintiff in consequence of Defendants' violations of Section 276 of the Act and the FCC regulations and/or orders issued pursuant thereto.

28. The FCC has required that a carrier that fails to pay the full amount of payphone compensation by the required due date must pay interest on the unpaid balance at the rate established by the Internal Revenue Service pursuant to 26 U.S.C. § 6621 (the "IRS Rate"). Accordingly, Defendants owe Plaintiff pre-judgment interest on the unpaid payphone compensation at the IRS rate, beginning as of the first day of the quarter following the submission by Plaintiff to Defendants of an ANI list. Alternatively, Defendants owe Plaintiff pre-judgment interest at the maximum rate permitted under applicable state law.

29. Defendants are liable for Plaintiff's reasonable attorneys' fees under 47 U.S.C. § 206.

SECOND CAUSE OF ACTION
VIOLATION OF 47 U.S.C. § 201

30. Plaintiff realleges paragraphs 1 through 29.

31. Pursuant to applicable orders and regulations promulgated by the FCC, Defendants are required to track calls placed from Plaintiff's payphones and routed by Defendants to their FBRs/SBRs, and to provide the tracking information, identification of FBRs/SBRs, and contact information concerning the FBRs/SBRs, to Plaintiff to enable Plaintiff to pursue collection from the FBRs/SBRs of amounts of payphone compensation for which the FBRs/SBRs are responsible.

32. Defendants have failed to track all calls from Plaintiff's payphones that have been routed to Defendants' FBRs/SBRs, and/or have failed to provide to Plaintiff the tracking information, including but not limited to

the identity of and contact information for the reseller for each such call routed to a FBR/SBR.

33. Defendants' failures to track compensable calls and to provide tracking information to Plaintiff, as well as Defendants' failure to pay the full amount of payphone compensation owing, constitute unjust or unreasonable practices and/or an omission to do what the FCC orders and regulations require Defendants to do, all of which is unlawful under 47 U.S.C. § 201(b).

34. Plaintiff has suffered substantial damages as a proximate result of Defendants' unlawful acts and/or omissions, as alleged herein, the precise amount of which will be shown at trial.

35. Pursuant to 47 U.S.C. § 206, Defendants are liable to Plaintiff for the full amount of damages sustained in consequence of Defendants' unlawful practices, as alleged herein, including prejudgment interest, together with a reasonable attorneys' fees.

THIRD CAUSE OF ACTION FOR PAYMENT OF MONEY UNDER 47 U.S.C. § 407

36. Plaintiff realleges paragraphs 1 through 35.

37. The orders and regulations of the FCC relating to payphone compensation constitute orders for the payment of money by interexchange carriers including Defendants, to payphone service providers, including Plaintiff, within the scope and meaning of 47 U.S.C. § 407.

38. Pursuant to 47 U.S.C. § 407, 47 C.F.R. §§ 64.1300 *et seq.*, and the related orders of the FCC pertaining to payphone compensation, Defendants owe Plaintiff damages

for the compensable calls placed from Plaintiff's payphones and carried over Defendants' facilities for which Defendants have not paid payphone compensation, together with prejudgment interest and reasonable attorneys' fees.

FOURTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. § 416(C)

39. Plaintiff realleges paragraphs 1 through 38.

40. The orders and regulations of the FCC relating to payphone compensation constitute "orders" within the scope and meaning of 47 U.S.C. § 416(c).

41. Section 47 U.S.C. § 416(c) requires the Defendants to comply with all such FCC "orders."

42. By failing to track compensable calls, failing to provide tacking information to Plaintiff, and failing to pay the full amount of payphone compensation owing, Defendants have violated FCC "orders" pertaining to payphone compensation.

43. Pursuant to 47 U.S.C. § 416(c), Defendants are liable to Plaintiff for the full amount of damages sustained as a result of Defendants violations of 47 U.S.C. § 416(c), together with prejudgment interest and reasonable attorneys' fees.

FIFTH CAUSE OF ACTION
UNJUST ENRICHMENT

44. Plaintiff realleges paragraphs 1 through 43.

45. By permitting callers to use Plaintiff's payphones to place calls over Defendants' network, Plaintiff has performed services impliedly requested by Defendants, and have conferred an economic benefit on Defendants, which Defendants have willingly accepted, in that by completing calls received from Plaintiff's payphones, Defendants earn substantial revenue and profits from such calls.

46. Defendants knew or should have known that by accepting, transporting, and completing calls placed from Plaintiff's payphones, they were receiving an economic benefit in the form of revenues and profits received by reason of such calls, and that Plaintiff expected and were entitled to be compensated for such calls.

47. By receiving the economic benefits of calls placed from Plaintiff's payphones without compensating Plaintiff, Defendants have been unjustly enriched at the expense of Plaintiff.

48. Defendants should be equitably required to compensate Plaintiff for the reasonable value of the services performed by Plaintiff that have benefited Defendants.

49. Defendants are liable to Plaintiff for the reasonable value of the benefits conferred on Defendants, plus prejudgment interest thereon at the maximum rate allowed by law, and reasonable attorney fees.

SIXTH CAUSE OF ACTION
IMPLIED CONTRACT

50. Plaintiff realleges ¶¶ 1 through 49.

51. By making its payphones available to members of the general public to place coinless calls that could be carried by Defendants, Plaintiff impliedly offered to Defendants the use of their payphones by customers of Defendants to place calls over Defendants' networks, thus enabling Defendants to reap the benefits of providing their own customers with the ability to place calls from Plaintiff's payphones. Such benefits included the revenue and profits derived from such calls, as well as the good will generated by providing a convenient service to Defendants' customers. Plaintiff offered such service on the condition and in the expectation that Defendants would compensate Plaintiff at the rates established by the FCC, and under the conditions set by the FCC, including but not limited to the payment of interest on unpaid payphone compensation.

52. By accepting, transporting, and completing calls made from Plaintiff's payphones by Defendants' customers, Defendants impliedly accepted Plaintiff's offer of service.

53. Plaintiff provided adequate consideration to Defendants, by making their payphones available for Defendants' customers to place coinless calls for which Plaintiff would receive no compensation from Defendants' customers, yet the payphones would be unavailable for use by paying customers while in use by Defendants' customers during such coinless calls. In addition, by making their payphones available for use by Defendants' customers, Plaintiff conferred an economic benefit on Defendants,

enabling Defendants to receive the revenue and profits from coinless calls placed by Defendants' customers.

54. As a result of the foregoing, an implied contract was created between each Plaintiff and each Defendants whose customers used that Plaintiff's payphones to place calls that were accepted, transported, and completed by the Defendants.

55. Defendants have breached the implied contracts by failing to pay the full amount of compensation owing.

56. Plaintiff is entitled to damages for breach of the implied contracts, plus interest thereon at the rate set by the FCC or at the highest rate allowed by state law, and reasonable attorneys' fees.

SEVENTH CAUSE OF ACTION NEGLIGENCE

57. Plaintiff realleges ¶¶1 through 56.

58. Pursuant to applicable orders and regulations promulgated by the FCC, Defendants are required, and therefore have a legal duty, to track calls placed from Plaintiff's payphones and routed by Defendants to their facilities based resellers, and to provide the tracking information, identification of facilities based resellers, and contact information concerning the facilities based resellers, to Plaintiff to enable Plaintiff to pursue collection from the facilities based resellers of amounts of payphone compensation for which the facilities based resellers are responsible.

59. Defendants have negligently failed to perform one or more of their legal duties set forth in the preceding paragraph.

60. As a proximate result of Defendants' negligent breach of their legal duties as set forth above, Plaintiff has been damaged in amounts to be proved at trial, including but not limited to damages resulting from the inability to pursue collection of payphone compensation from Defendants' facilities based resellers.

61. Defendants are liable to Plaintiff for the damages suffered by reason of Defendants' negligent failure to perform their legal duties as set forth above, together with prejudgment interest at the highest rate allowed by law.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. On the First Cause of Action, for all payphone compensation owed by Defendants to Plaintiff under rules, regulations, and orders of the FCC, the exact amount of which will be proven at trial, together with prejudgment interest at the IRS rate, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

2. On the Second Cause of Action, for damages proximately resulting from Defendants' unjust and unreasonable practices as alleged herein, the exact amount of which will be proven at trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

3. On the Third Cause of Action, for damages proximately resulting from Defendants' failure to pay money as ordered by the FCC, as alleged herein, the exact amount of which will be proven at trial, prejudgment interest at the maximum rate and for the maximum period allowed by

law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

4. On the Fourth Cause of Action for damages proximately resulting from Defendants' violations of 47 U.S.C. § 416(c), the exact amount of which will be proven at trial, prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

5. On the Fifth Cause of Action, for the reasonable value of the economic benefits conferred on Defendants by Plaintiff as alleged herein, which will be established at trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

6. On the Sixth Cause of Action, for damages for breach of implied contract, measured by the rates set by the FCC for payphone compensation, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, costs of court, reasonable attorneys' fees, and such other relief as the Court deems just

7. On the Seventh Cause of Action, for damages proximately caused by Defendants' negligence, the exact amount of which will be proven at trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, costs of court, and such further relief as the Court deems just.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues that may be tried to a jury.

DATED this 20th day of October, 2003.

KELLER ROHRBACK L.L.P.

By _____
David J. Russell, WSBA #17289
Attorneys for Plaintiff

[Certificate Of Service Omitted In Printing]